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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

MONTRELL WOODS,

Defendant and Appellant.

C087859

(Super. Ct. No. 14F00551)

This case returns to us following remand to the trial court to exercise its discretion as to whether to strike defendant Montrell Woods’s firearm enhancement under Penal Code¹ section 12022.53, subdivision (d) pursuant to the trial court’s authority under Senate Bill No. 620 and the associated amendment to section 12022.53, subdivision (h), effective January 1, 2018. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) Section 12022.53, subdivision (h) gives trial courts discretion to “strike or dismiss” a section 12022.53 enhancement “in the interest of justice pursuant to [s]ection 1385 and at the time of sentencing”

¹ All further section references are to the Penal Code unless otherwise specified.

At resentencing, the trial court declined to strike the enhancement. Defendant contends the trial court abused its discretion in two ways: (1) in failing to recognize its discretion to impose a lesser firearm enhancement in lieu of the 25-years-to-life enhancement under section 12022.53, subdivision (d) in the interests of justice, as stated in *People v. Morrison* (2019) 34 Cal.App.5th 217; and (2) based on a serious mistake of law and fact regarding the impact of the enhancement on the timing of defendant's first youthful offender parole hearing. We affirm.

As to the first contention, we disagree with *Morrison* and agree with *People v. Tirado* (2019) 38 Cal.App.5th 637 (review granted Nov. 13, 2019, S257658) that, in considering whether to strike the section 12022.53, subdivision (d) enhancement, the trial court did not have discretion to impose a lesser firearm enhancement under section 12022.53, subdivisions (b) and (c). As to the second contention, we find the trial court's erroneous belief as to the timing of defendant's first youthful offender parole hearing did not result in a manifest miscarriage of justice.

FACTUAL AND PROCEDURAL BACKGROUND

Due to the limited issues on appeal, we do not discuss the background facts of the case at length. Suffice it to say defendant "shot Kenny Hernandez to death during a confrontation between the two men at an apartment complex." (*People v. Woods, supra*, 19 Cal.App.5th at p. 1082.) Defendant was charged with murder and being a felon in possession of a firearm. It was further alleged he used, and intentionally and personally discharged a firearm, and thereby proximately caused great bodily injury or death under section 12022.53, subdivisions (b), (c), and (d). With regard to the enhancement, the jury was instructed to consider only whether the allegation was true under section 12022.53, subdivision (d).

The jury found defendant guilty of second degree murder and being a felon in possession of a firearm. The jury further found true the enhancement under section 12022.53, subdivision (d).

We affirmed the judgment on appeal but remanded the case to the trial court to exercise its discretion as to whether to strike the firearm enhancement, as provided in section 1385 and the amendment to section 12022.53, subdivision (h) under Senate Bill No. 620. (*People v. Woods, supra*, 19 Cal.App.5th at pp. 1090-1091.)

Prior to the resentencing hearing, the trial judge requested the following information from the California Department of Corrections and Rehabilitation (the department): (1) defendant's "activity/status in prison since his original sentencing"; (2) "factors in mitigation/aggravation applicable to whether to dismiss the 25-years-to-life firearm enhancement" and the department's reasons for recommending the enhancement be imposed; and (3) when defendant would be eligible for parole review under section 3051 for youthful offenders if the enhancement was not imposed. As to the last question, the department responded that defendant would be eligible for parole review under section 3051, subdivision (b)(2) for youthful offenders during his 20th year of incarceration if the enhancement was not imposed.

At the resentencing hearing, prior to the parties' arguments, the trial judge said: "I would just observe unfortunately, I would characterize it, the court's decision is all or nothing. This is either an additional term of 25 years to life or no enhancement." The judge discussed the factors in mitigation, including defendant's developmental disabilities, and that he had been discipline free, participated in programs, and worked during incarceration. The judge then said: "I'm nevertheless not striking the enhancement." He explained: "I do not find it in the interest of justice to strike the enhancement because of the nature of the crime and, the court's view, having listened to the evidence at trial that possession of a firearm was central to this murder."

The decision was more complex than a "but for" analysis, the judge said. "[Defendant] was on probation at the time. He had a felony conviction. He was not supposed to have any firearms or ammunition on him. [The judge] just d[id]n't think this encounter that started off as just the rough-and-tumble encounters of life would have

escalated into a confrontation and a shooting had [defendant] not been carrying the firearm.” After reviewing and discussing the facts of the case, the judge reiterated: “I just don’t think this would have led to a shooting had [defendant] not been carrying a gun in violation of law and his conditions on probation.” “So based on that, [the] tentative decision w[as] to reimpose the same sentence that was imposed before.”

The judge gave counsel an opportunity to argue their positions. When the prosecutor said, “[s]o in essence, the 15 to life or 40 to life, the 40 to life doesn’t mean anything because of the automatic parole reviews that juveniles now get,” defense counsel responded: “My understanding is that there is a separate procedure for somebody who committed an offense as a juvenile. When this occurred, [defendant] was not a juvenile, so he would not be avail [*sic*] of the same things that a juvenile offender would be.” The judge responded: “Under Penal Code section 3051[, subdivision] (b)(3), as I read it, he would be eligible for parole review after 25 years, regardless of the sentence that I impose. Is that your reading, [prosecutor]?” The prosecutor said, “[y]es.” The judge continued: “So you’re right. He’s not a juvenile, but the Legislature has also viewed younger offender older than juveniles.” Defense counsel said: “There’s also another one for juveniles and that’s what -- I was confusing that.” The judge responded: “My understanding is [defendant] would be eligible for parole review 25 years into his sentence.” Defense counsel did not disagree with the trial court’s statement.

The court sentenced defendant to 15 years to life for the murder and to a consecutive term of 25 years to life for the firearm enhancement found true under section 12022.53, subdivision (d).

Defendant appeals.

DISCUSSION

I

The Trial Court Did Not Have Discretion To Impose A Lesser Enhancement

Defendant contends the trial court misunderstood the scope of its discretion and requests that we remand for the trial court to consider whether to substitute a lesser enhancement under section 12022.53, subdivisions (b) or (c) for the greater enhancement under subdivision (d) of the statute, as explained in *Morrison*. (*People v. Morrison*, *supra*, 34 Cal.App.5th at pp. 220, 222.) The People assert “*Morrison* was wrongly decided and should not be followed by this Court.” We agree with the People.

“On October 11, 2017, Governor Brown signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended sections 12022.5 and 12022.53 to provide trial courts with the discretion to strike a firearm enhancement or finding. [Citation.] Senate Bill No. 620 added the following language to both statutes: ‘The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, *strike or dismiss an enhancement* otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.’ ” (*People v. Morrison*, *supra*, 34 Cal.App.5th at pp. 221-222, italics added.) This addition was added to section 12022.53 as subdivision (h).

“ ‘Section 12022.53 sets forth the following escalating additional and consecutive penalties, beyond that imposed for the substantive crime, for use of a firearm in the commission of specified felonies, including . . . murder: a 10-year prison term for personal use of a firearm, even if the weapon is not operable or loaded (*id.*, subd. (b)); a 20-year term if the defendant “personally and intentionally discharges a firearm” (*id.*, subd. (c)); and a 25-years-to-life term if the intentional discharge of the firearm causes “great bodily injury” or “death, to any person other than an accomplice” (*id.*, subd. (d)). For these enhancements to apply, the requisite facts must be alleged in the information or indictment, and the defendant must admit those facts or the trier of fact must find them to

be true.’ [Citation.] Section 12022.53, subdivision (f) provides, ‘Only one additional term of imprisonment under this section shall be imposed per person for each crime. If more than one enhancement per person is found true under this section, the court shall impose upon that person the enhancement that provides the longest term of imprisonment’ ” (*People v. Morrison, supra*, 34 Cal.App.5th at p. 221.)

As in this case, in *Morrison*, the jury found true only the enhancement allegation under section 12022.53, subdivision (d). (*People v. Morrison, supra*, 34 Cal.App.5th at p. 221.) After the trial court recalled the sentence to exercise its discretion as provided in section 12022.53, subdivision (h), the court declined to strike the firearm enhancement. (*Morrison*, at p. 220.) On appeal, the defendant argued the “case should be remanded for resentencing because the court did not understand the scope of its discretion” given its failure to consider whether to modify the enhancement to a “ ‘lesser included’ enhancement under section 12022.53, subdivision (b) or (c), which carry lesser terms of 10 years or 20 years, respectively.” (*Id.* at p. 221.)

The First District Court of Appeal agreed with the defendant, citing case law providing “the court may impose a ‘lesser included’ enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence.”² (*People v. Morrison, supra*, 34 Cal.App.5th at p. 222.) The court further relied on our Supreme Court’s analysis in *People v. Marsh* (1984) 36 Cal.3d 134. (*Morrison*, at p. 223.) Like our colleagues in the Fifth District Court of Appeal, we do not find this analysis persuasive. (*People v. Tirado, supra*, 38 Cal.App.5th at p. 644.)

We agree with the statutory interpretation set forth in *Tirado*. (*People v. Tirado, supra*, 38 Cal.App.5th at p. 643.) The plain language of sections 1385 and 12022.53,

² Neither of those circumstances are present here. The section 12022.53, subdivision (d) finding was supported by sufficient evidence and defendant does not contend otherwise.

subdivision (h) authorizes the trial court to either dismiss or strike an enhancement; “[t]here is nothing in either statute that conveys the power to change, modify, or substitute a charge or enhancement.” (*Tirado*, at p. 643.) The *Tirado* court’s comparison of the language in section 1385 with language in other statutes permitting a court to modify a charge or enhancement (e.g., sections 1260 and 1181, subdivision (6)) aptly demonstrates this point. (*Tirado*, at p. 643.)

In the absence of an admission or true finding under section 12022.53, subdivisions (b) and (c), if the trial court were to strike the enhancement found true under subdivision (d), there would be no other section 12022.53 enhancement to impose and execute or to strike. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118 [enhancements found true under section 12022.53 subdivisions (b) and (c) must be imposed and stayed, not stricken, when the sentence under subdivision (d) is imposed in accordance with subdivision (f) (*id.* at pp. 1123, 1127) to “mak[e] the prohibited enhancements *readily* available should the section 12022.53 enhancement with the longest term be found invalid on appeal” (*id.* at p. 1129); if the prohibited enhancements under section 12022.53, subdivisions (b) and (c) were stricken, it would “mak[e] it more difficult, if not impossible, to impose and execute the term of imprisonment for an initially prohibited firearm enhancement in the event the section 12022.53 enhancement with the longest term of imprisonment is invalidated on appeal” (*id.* at p. 1128)].)

The case law upon which *Morrison* relied -- i.e., that a “court may impose a ‘lesser included’ enhancement that was not charged in the information when a greater enhancement found true by the trier of fact is either legally inapplicable or unsupported by sufficient evidence” (*People v. Morrison, supra*, 34 Cal.App.5th at p. 222) -- did not arise in the context of power statutorily conferred upon the court under section 1385. In other words, the authority discussed in those cases is independent of section 1385’s authority and not circumscribed by section 1385’s language.

We also do not see how *Marsh* supports the position espoused in *Morrison*. In *Marsh*, our Supreme Court merely explained that the trial court has “a broad range of sentencing options” in exercising its discretion to *strike* allegations under section 1385. (*People v. Marsh, supra*, 36 Cal.3d at pp. 143-144.) We find nothing in the opinion indicating that the trial court’s section 1385 powers include the *imposition* of an allegation, action, or enhancement different from that presented to the jury.

For these reasons, we conclude the trial court properly understood the scope of its discretion when it considered whether to strike defendant’s enhancement under section 12022.53, subdivision (d).

II

The Trial Court Did Not Abuse Its Discretion In Declining To Strike The Enhancement

When exercising its discretion under section 1385, a trial court considers factors including the defendant’s rights, the interests of society, and individualized considerations pertaining to the defendant and his or her offenses and background. (*People v. Rocha* (2019) 32 Cal.App.5th 352, 359.) The denial of a motion to dismiss pursuant to section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376; *People v. Tirado, supra*, 38 Cal.App.5th at p. 642.) “Where, as here, a discretionary power is . . . by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Defendant and the People agree the trial court erroneously stated during the hearing that defendant would be eligible for a youthful offender parole hearing during his 25th year of incarceration, if the enhancement was not imposed, rather than his 20th year of incarceration. Defendant contends the trial court abused its discretion by failing to make an informed decision because it relied on a mistake of law and fact relating to the

timing of the youthful offender parole hearing in declining to strike the enhancement. The People argue defendant forfeited the contention because his counsel failed to object to the trial court's erroneous understanding at the time of the hearing and, even if not forfeited, defendant failed to show prejudice or ineffectiveness of counsel.

We find no manifest miscarriage of justice and disagree with defendant that "the impact of resentencing on the timing of the first youthful offender parole hearing was rightly a central concern here." The central concern for the trial court in reaching its decision was "the nature of the crime and, the court's view, having listened to the evidence at trial that possession of a firearm was central to this murder." Indeed, the trial court twice stated this was the basis for its decision. Although the trial court requested information regarding the timing of defendant's youthful offender parole review in advance of the hearing, the court did not identify it as a determinant factor in reaching its decision. We, therefore, conclude the trial court's erroneous understanding as to the timing of the youthful offender parole hearing did not result in a manifest miscarriage of justice.

DISPOSITION

The judgment is affirmed.

/s/
Robie, Acting P. J.

I concur:

/s/
Renner, J.

I concur in the result.

/s/
Mauro, J.